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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

RUBEN MENDOZA et al., Plaintiffs and Appellants, v. JURUPA COMMUNITY SERVICES DISTRICT et al., Defendants and Respondents.	E046336 (Super.Ct.Nos. RIC452753 RIC456409) OPINION

APPEAL from the Superior Court of Riverside County. Gary B. Tranbarger, Judge. Affirmed in part, reversed in part.

Law Office of Kathleen M. Keefe and Kathleen M. Keefe for Plaintiffs and Appellants.

Koeller, Nebeker, Carlson & Haluck and Tracy L. Hughes for Defendants and Respondents.

Ruben Mendoza and his family (the Mendozas) sued Jurupa Community Services District (JCSD);[1] JCSD's employee, Elias Rivero (Rivero); and various other parties, for negligence, trespass, nuisance, and emotional distress. The trial court granted JCSD's and Rivero's demurrer without leave for the Mendozas to amend their third amended complaint (the complaint). The Mendozas contend that the trial court erred by granting the demurrer because the trial court incorrectly concluded that JCSD and Rivero are immune from liability pursuant to principles of government tort liability. We affirm in part and reverse in part.

FACTUAL AND PROCEDURAL HISTORY

A. Facts

We present the facts, and then the procedural history. The following facts are taken from the complaint.[2]

Ruben Mendoza and members of his immediate family resided in a house in the Rubidoux area of Riverside (the main house). Ruben Mendoza's son, Julio Mendoza,

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[1] Community service districts provide public facilities and services; can "serve as an alternative to the incorporation of a new city" (Gov. Code, § 61001, subd. (b)(3)); and/or act as "[a] transitional form of governance as [a] community approaches cityhood" (Gov. Code, § 61001, subd. (b)(4)). Specifically, community service districts may provide water, sewage service, fire protection, recreation facilities, street lights, disease control, police protection, library services, roads, emergency medical services, public airports, transportation services, flood protection facilities, as well as a variety of other services and infrastructure. (Gov. Code, § 61100.)

[2] We take the facts from the complaint, because "[o]n appeal from a judgment of dismissal following an order sustaining a demurrer without leave to amend, we must treat every material, issuable fact properly pleaded as true [citation] and shall treat pleaded facts as if they were established facts." (*Buford v. California* (1980) 104 Cal.App.3d 811, 815.)

and his family lived in a guest house (the guest house) on the same property as the main house, and they paid rent to Ruben Mendoza.

The Riverside County Planning Department (the Department) became aware of plans to develop certain lots, in an area known as Sunnyslope Heights, which is adjacent and uphill from the property owned by the Mendozas (the Sunnyslope Heights property). The Department required that precise grading plans be submitted prior to building permits being issued for the Sunnyslope Heights property. A geotechnical investigative report reflected that a 12-inch subterranean water main was located on the Sunnyslope Heights property. The report also indicated the approximate location of the water main. JCSD had its own maps and documents reflecting the location of the water main.

On July 1, 2005, the Department issued a permit for purposes of grading the Sunnyslope Heights property. On July 22, 2005, MP Engineering, whose employees were working on the Sunnyslope Heights property grading project, contacted DigAlert to obtain the location of underground utilities, including water mains, on the Sunnyslope Heights property. DigAlert contacted JCSD on July 22, 2005, and informed JCSD that grading would commence on July 26, 2005; therefore, JCSD needed to mark its underground utilities on the Sunnyslope Heights property prior to July 26.

Rivero worked for JCSD as a Water Operator II. Rivero was assigned to locate and mark the 12-inch water main on the Sunnyslope Heights property. Rivero did not properly mark the water main or inform MP Engineering that the water main may be affected by the grading project.

On or about September 20, 2005, MP Engineering, along with the Sunnyslope Heights property owners and other individuals (collectively, the excavators), began excavating the Sunnyslope Heights property. The excavators used power-driven equipment, rather than hand tools, to excavate the Sunnyslope Heights property. While working, one or more of the excavators caused the water main to rupture. As a result, a flood of water and mud rushed through the Mendozas' main house and guest house. Julio Mendoza's wife, Veronica Mendoza, and their infant daughter were in the guest house at the time of the flood, and the infant nearly drowned. The infant suffered upper respiratory infections following the near drowning.

Water flowed from the ruptured water main for approximately one hour. The main house and the guest house were flooded with three to four feet of mud and water; the guest house was knocked off its foundation by the force of the mud and water; and both houses, as well as the contents of both houses, were destroyed. The main house and the guest house were declared unfit for human occupancy. The Mendozas were rendered homeless as a result of the flood.

Following the flood, JCSD arranged for contractors to remove the interior walls, drywall, floor coverings, plumbing fixtures, electrical systems, appliances, cabinets, and insulation from the main house and the guest house. However, JCSD has not attempted to repair either house—both the guest house and the main house remain without drywall, interior walls, plumbing, electrical systems, appliances, or floor coverings. Initially, JCSD paid for the Mendozas to stay in motels, but eventually JCSD stopped paying the lodging bill, and the Mendozas moved into their garage. At one point, JCSD

provided the Mendozas with two rented trailers, which were placed on the Mendozas' property. In approximately January 2006, JCSD removed the trailer that Julio Mendoza's family had been living in. At about that same time, Julio Mendoza moved his family to Bakersfield. In February 2006,[3] JCSD removed the second trailer from the Mendozas' property, which left Ruben Mendoza's family homeless.

B. Procedural History

The Mendozas filed individual government tort claims with JCSD on February 27, 2006. JCSD rejected all of the claims on March 28, 2006. On March 3, 2006, the Mendozas sent demands to repair or pay for damages to all the defendants named in the complaint; however, none of the defendants agreed to repair the damage or pay for the damage.

The following procedural history is taken from the record on the appeal, i.e., the history is not limited to the complaint.

The Mendozas filed the complaint on December 19, 2007. JCSD and Rivero demurred to the complaint. JCSD and Rivero argued that Government Code section 4216 et seq.,[4] which concerns underground infrastructure, and section 815.6, which provides for the mandatory duty of a public entity to protect against particular kinds of injuries, did not create a mandatory duty of care on the part of JCSD and Rivero.

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[3] The complaint reflects that the date was February 2005; however, we infer from the other alleged facts in the complaint that this is incorrect, and the correct date is February 2006.

[4] All further statutory references are to the Government Code unless otherwise indicated.

Further, JCSD asserted that it was immune from liability due to its status as a government entity; and that, because it is a public entity, it is not vicariously liable for Rivero's actions. (§ 815.2.)

In regard to section 4216, the trial court informed the Mendozas that they would need a "specialized statute not a general statute" in order for the demurrer to be overruled. The trial court did not explain why section 4216 was too "general," i.e., too general to impose a duty on JCSD, and/or too general to exempt JCSD from governmental immunity. A trial attorney for the Mendozas' neighbor argued that section 815.2 created "independent grounds for . . . liability." In response to this argument, the trial court said, "Insufficient. Sustained without leave." It is unclear if the trial court was finding that section 815.2 was "insufficient," and/or whether it found the trial attorney's argument to be "insufficient."

DISCUSSION

The Mendozas contend that the trial court erred by sustaining JCSD and Rivero's demurrer without leave to amend, because JCSD and Rivero are not immune from tort liability pursuant to Government Code sections 4216 et seq., 815.6, and Public Utilities Code section 2106. We disagree.

We review the trial court's order de novo, "exercising our independent judgment as to whether, as a matter of law, the complaint states a cause of action on any available legal theory. [Citation.]" (*Ortega v. Contra Costa Community College Dist.* (2007) 156 Cal.App.4th 1073, 1080.) "If the [trial] court sustained the demurrer without leave to amend, as here, we must decide whether there is a reasonable possibility [that] the

plaintiff could cure the defect with an amendment. [Citation.]" (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) "The plaintiff has the burden of proving that an amendment would cure the defect. [Citation.]" (*Ibid.*)

We begin our analysis by examining Public Utilities Code section 2106, and then turn to Government Code sections 815.6 and 4216 et seq.

A. Public Utilities Code Section 2106

1. *Statutory Language*

Public Utilities Code section 2106 provides, "Any public utility which does, causes to be done, or permits any act, matter, or thing prohibited or declared unlawful, or which omits to do any act, matter, or thing required to be done, either by the Constitution, any law of this State, or any order or decision of the commission, shall be liable to the persons or corporations affected thereby for all loss, damages, or injury caused thereby or resulting therefrom. . . . An action to recover for such loss, damage, or injury may be brought in any court of competent jurisdiction by any corporation or person."

2. *Analysis*

"Public Utilities Code section 2106 was enacted to supplement the public remedies enumerated elsewhere in chapter 11 of the Public Utilities Act (Pub. Util. Code, § 2100 et seq.) 'by authorizing the traditional private remedy of an action for damages brought by the injured party in superior or municipal court . . . .' [Citation.] The statute simply allows claims to be brought against utilities . . . by private individuals. [Citations.]" (*Jackson v. Pacific Gas & Elec. Co.* (2001) 94 Cal.App.4th

1110, 1120.) Lawsuits against a utility pursuant to Public Utilities Code section 2106 are barred only when the claims are such that an award of damages would "hinder or frustrate the [Public Utilities C]ommission's declared supervisory and regulatory policies." (*Waters v. Pacific Telephone Co.* (1974) 12 Cal.3d 1, 4, 11; *Jackson,* at pp. 1120-1121.)

In regard to Public Utilities Code section 2106, the Mendozas' action against JCSD fails because the constitution defines the term "public utilit[y]" as "[p]rivate corporations and persons that own, operate, control, or manage a line, . . . or system for . . . water . . . directly or indirectly to or for the public." (Cal. Const., art. XII, § 3.) JCSD is not a private corporation or a person, rather, it is a community services district. (Gov. Code, § 61100.) Accordingly, JCSD does not fall within the definition of "public utility." Therefore, Public Utilities Code section 2106 is not applicable to JCSD.

B. Sections 815.6 and 4216 et seq.

We now turn to the Mendozas' contentions concerning sections 815.6 and 4216 et seq.

1. *Statutory Language*

Section 815.6, concerning the liability of public entities, provides, "Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty."

2. *Analysis*

"Under the Government Claims Act [citation], there is no common law tort liability for public entities in California; instead, such liability must be based on statute. [Citations.] One such statute is . . . section 815.6 . . . ." (*Guzman v. County of Monterey* (2009) 46 Cal.4th 887, 897 (*Guzman*).) "The elements of liability under . . . section 815.6 are as follows: 'First and foremost, application of section 815.6 requires that the enactment at issue be *obligatory*, rather than merely discretionary or permissive, in its directions to the public entity; it must *require*, rather than merely authorize or permit, that a particular action be taken or not taken. [Citation.] It is not enough, moreover, that the public entity or officer have been under an obligation to perform a function if the function itself involves the exercise of discretion. [Citation.]' [Citation.] Courts have construed this first prong rather strictly, finding a mandatory duty only if the enactment 'affirmatively imposes the duty and provides implementing guidelines.' [Citations.]" (*Id*. at p. 898.)

"'Second, but equally important, section 815.6 requires that the mandatory duty be "designed" to protect against the particular kind of injury the plaintiff suffered. The plaintiff must show the injury is "'one of the consequences which the [enacting body] sought to prevent through imposing the alleged mandatory duty.'" [Citation.] Our inquiry in this regard goes to the legislative *purpose* of imposing the duty. That the enactment "confers some benefit" on the class to which [the] plaintiff belongs is not enough; if the benefit is "incidental" to the enactment's protective purpose, [then] the

enactment cannot serve as a predicate for liability under section 815.6. [Citation.]' [Citations.]" (*Guzman*, *supra*, 46 Cal.4th at p. 898.)

Section 4216.3, subdivision (a), requires that a utility operator, within two working days of receiving notification of an excavator's intent to dig, "locate and field mark the approximate location and, if known, the number of subsurface installations that may be affected by the excavation to the extent and degree of accuracy that the information is available," or the operator must advise the excavator that it does not operate any subsurface installations that would be affected by the proposed excavation. Additionally, operators must make a reasonable effort to mark water installations with the color "Safety Precaution Blue." (§ 4216.3, subd. (b)(4).)

The language of section 4216.3, subdivision (a), is obligatory, not discretionary or permissive, because it requires that utility operators field mark their subsurface installations—utility companies are not given the option of not marking their subsurface installations upon receiving notice of an intent to dig. Further, section 4216.3 provides guidelines for implementing the directive: (1) the field marking must be completed within two working days of the utility company receiving notification of an intent to dig (§ 4216.3, subd. (a)(1)); and (2) the field markings for water installations should be in "Safety Precaution Blue." (§ 4216.3, subd. (b)(4).) Based upon the foregoing examination of the statutory language, we conclude that the first prong of the analysis is satisfied, i.e., section 4216.3 creates a mandatory duty, because (1) the duty is obligatory, and (2) the statute provides directions for carrying out the duty.

Next, we must determine if the mandatory duty was designed to protect against the particular type of injuries suffered by the Mendozas. Section 4216 was added to the Government Code in 1983, at the same time that section 4215.5 was repealed. (Stats. 1982, ch. 1507, § 2, pp. 5849-5851.) Section 4215.5 and 4216 both relate to subsurface installations.[5] (Stats. 1982, ch. 1507, §§ 1-3, pp. 5849-5851.) Section 4215.5 was set to expire on July 1, 1983, and sections 4216 and 4217 essentially set forth a more detailed set of laws concerning excavations near subsurface installations, following the expiration of section 4215.5. Accordingly, although the Legislature did not provide the purpose for enacting or amending section 4216 et seq., we look to the Legislature's explicit purpose for enacting section 4215.5, because the sections are so closely related. Section 4215.5 was enacted "for the purpose of protecting [subsurface] installations from damage, removal, relocation, or repair." In particular, section 4215.5 created the "regional notification center," which is the organization that excavators contact when they plan to excavate and who, in turn, contacts the local utilities to inform them of planned excavation, so that the utilities can mark their subsurface installations. (Stats. 1982, ch. 1507, § 1, pp. 5850.)

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[5] Section 4215.5 read, in part: "The legislative body of a city, city and county, or county may by ordinance require public utility companies owning or operating subsurface installations and all other owners or operators of subsurface installations within public streets, to become members, participate in the activities, and share in the costs of a regional notification center providing advance warning of excavations or other work close to existing installations, for the purpose of protecting such installations from damage, removal, relocation, or repair." (Stats. 1982, ch. 1507, § 1, pp. 5850.)

The Legislature's intent of protecting subsurface installations by creating the "regional notification center" is reflected in the version of section 4216 et seq., which was in effect at the time the Mendozas' homes were damaged in 2005: Section 4216.1 requires that every operator of a subsurface installation "become a member of, participate in, and share in the costs of, a regional notification center." Consequently, we conclude that the purpose of section 4216 et seq. is to protect underground infrastructure from damage. An incidental benefit of protecting underground infrastructure is that residential buildings will not be harmed by sewage spills, gas leaks, or electrical disruptions. In other words, the mandatory duty in section 4216.3 was not designed to protect against the particular type of injuries suffered by the Mendozas.[6] Consequently, we conclude that the Mendozas' claims for damages do not go to the legislative purpose of section 4216.3. In sum, the Mendozas failed to satisfy the second prong of the analysis; and therefore, the trial court did not err by granting the demurrer.

C. Limitation of Our Holding

Our opinion in this matter is not meant to foreclose upon people bringing lawsuits against community service districts. Section 61119 and former section 61628

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[6] We note that on August 27, 2006, Senator Tom Torlakson wrote a letter to the Secretary of the Senate explaining that he introduced amendments to Government Code section 4216, i.e. Senate Bill 1359, "to protect workers as well as the underground [installations] themselves." The workers that Senator Torlakson was referring to are the people who do excavation work. (Sen. Daily Journal (2005-2006 Reg. Sess.) pp. 5608-5609.) We do not discuss this letter when analyzing the purpose of section 4216, because the damage to the Mendozas' property occurred on September 20, 2005—approximately 11 months before the letter was written. Nevertheless, we acknowledge that the purpose of section 4216 may have changed as a result of statutory amendments that were enacted after the flooding of the Mendozas' property.

provide that all claims for money damages against community services districts are governed by section 900 et seq. and section 940 et seq. Specifically, section 905 is the primary authority for "all claims for money or damages against local public entities." Section 945 provides that "[a] public entity may sue and be sued"; and a "local public entity" is defined as "a county, city, *district*, public authority, public agency, and any other political subdivision or public corporation in the State, but does not include the State" (§ 940.4, italics added). Additionally, in regard to employees of community service districts, section 950 authorizes claims "against a public employee or former public employee for [an] injury resulting from an act or omission in the scope of his employment as a public employee." In sum, it is not our opinion that community services districts are immune from civil lawsuits, rather, we have concluded that the particular code sections cited by the Mendozas do not remove any of the governmental immunities that JCSD may possess; nor do the code sections cited by the Mendozas impose a mandatory duty on JCSD.

D. Leave to Amend

We now determine whether the trial court abused its discretion by denying the Mendozas leave to amend their complaint. (Code Civ. Proc., § 472c, subd. (a).) We conclude that the court did abuse its discretion.

"If we find that an amendment could cure the defect, [then] we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred." (*Schifando v. City of Los Angeles*, *supra*, 31 Cal.4th at p. 1081.) The

Mendozas bear the burden of proving that an amendment would cure the defect in the complaint. (*Ibid*.)

The Mendozas cite *Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920 (*Nestle*), for the proposition that the Mendozas could amend their complaint to allege a nuisance cause of action against JCSD. In *Nestle*, our Supreme Court considered whether Government Code section 815 precluded government liability for nuisance. (*Nestle*, at p. 931.) Our high court concluded that Government Code section 815 "does not bar nuisance actions against public entities to the extent such actions are founded on section 3479 of the Civil Code or other statutory provision that may be applicable." (*Nestle*, at p. 937.) In other words, our high court construed Civil Code section 3479 as providing an adequate statutory basis for governmental liability. (See *Kempton v. City of Los Angeles* (2008) 165 Cal.App.4th 1344, 1349 [similar interpretation of *Nestle*]; see also *Friends of H Street v. City of Sacramento* (1993) 20 Cal.App.4th 152, 159, fn. 2 [same].)

Civil Code section 3479 provides: "Anything which is injurious to health . . . or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance."

"It has long been the law in California that '"[n]ot only is the party who maintains the nuisance liable but also the party or parties who create or assist in its creation are responsible for the ensuing damages."' [Citation.] Thus, courts have

upheld as against a demurrer a nuisance claim founded upon allegations that . . . defendant soils engineer prepared a plan for slope repair on a neighboring property which, when constructed, caused water, mud, and debris to flow onto the plaintiff's property [citation]. Similarly, a nonsuit on [a] plaintiff's cause of action for nuisance was reversed where the evidence showed defendant contractor dumped fill on a street, interfering with drainage and causing the plaintiff's property to be flooded. [Citation.]" (*City of Modesto Redevelopment Agency v. Superior Court* (2004) 119 Cal.App.4th 28, 38.) "In sum, liability for nuisance does not hinge on whether the defendant owns, possesses or controls the property, nor on whether he is in a position to abate the nuisance; the critical question is whether the defendant created or assisted in the creation of the nuisance. [Citation.]" (*Ibid.*)

Based upon the foregoing rules, we conclude that the Mendozas could amend their complaint to properly bring a cause of action for nuisance. The Mendozas third amended complaint already includes a cause of action for nuisance, and refers to Civil Code section 3479. We choose not to explain our analysis in great detail, because (1) we do not wish to draft the nuisance cause of action for the Mendozas; and (2) we do not want to bind the trial court in regard to a future demurrer that may be raised if the Mendozas amend their complaint. In sum, we conclude that the trial court abused its discretion because, based upon the cases and statutes cited *ante*, it appears that an amendment could cure the defects in the Mendozas' complaint. Therefore, we reverse the trial court's order denying the Mendozas leave to amend their complaint.

DISPOSITION

The order, or portion of the order, which granted the demurrer is affirmed. The order, or portion of the order, which denied leave to amend is reversed. The parties are to pay their own costs on appeal.

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/s/ MILLER
J.

We concur:

/s/ HOLLENHORST
Acting P. J.

/s/ GAUT
J.